

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re E.B., a Person Coming Under the
Juvenile Court Law.

H042077
(Santa Clara County
Super. Ct. No. 1-13-JD022234)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

D.B.,

Defendant and Appellant.

Father appeals an order of the trial court denying his petition under Welfare and Institutions Code, section 388¹ to modify a prior order in a dependency proceeding. On appeal, Father argues the court erred in summarily denying his petition.²

STATEMENT OF THE FACTS AND CASE

Father's daughter, E.B. was born in December 2012, and was the subject of a section 300 petition filed November 27, 2013. The petition alleged, under section 300,

¹ All further statutory references are to the Welfare and Institutions Code.

² The minor child brings a companion appeal in H042307 related to her permanent placement of guardianship.

that E.B. was at risk because of Mother's untreated substance abuse and mental health issues, and her inability to meet E.B.'s needs. The petition also alleged that E.B. was at risk in Father's care because of his criminal history as a registered narcotics offender.

On January 2, 2014, at the initial hearing, the court ordered E.B. detained, and found Father was E.B.'s presumed father. E.B. was placed with the maternal grandmother.

At the jurisdictional/dispositional hearing on April 28, 2014, the court sustained the section 300 petition. The children were ordered removed from Mother, and family reunification services were ordered for Mother and Father. Father's services were to include parenting classes, a relapse prevention plan, and twice weekly unsupervised visits.

The report for the six-month review recommended termination of reunification services. Father was still residing with his father and was unemployed. He had not participated in his case plan and had not visited with E.B. Father had apologized to the social worker for "being M.I.A." He said he had been unable to participate in his case plan because he was working 16 hours a day to pay off his \$7,200 DMV fees, but was now unemployed and would like to see his daughter and re-establish a relationship with her. Father asked to be re-referred to parent orientation and parenting classes.

At the six-month review hearing on November 7, 2014, the court terminated family reunification services and set the matter for a section 366.26 hearing. The court ordered visits reduced to once a month.

On February 27, 2015, Father filed a section 388 petition, requesting the court grant additional family reunification services and order unsupervised overnight weekend visits. In the alternative, he requested the court adopt a transition plan to return E.B. to his care. The petition alleged that Father had maintained consistent visitation with E.B. and had engaged in case plan services, including attending parenting class and

participating in a support group through the Fatherhood Collaborative. He had obtained steady employment and had stable housing.

On March 2, 2015, the court summarily denied the petition, stating the request did not state new evidence or a change of circumstances. The court noted that no supporting documentation was provided with the petition, and the proposed change did not promote the child's best interests.

Father filed a notice of appeal of the summary denial of his section 388 petition.

DISCUSSION

Father asserts the trial court erred in summarily denying his section 388 petition.

We review a juvenile court's denial of a section 388 petition for abuse of discretion. We "may not disturb the decision of the trial court unless that court has exceeded the limits of judicial discretion by making an arbitrary, capricious, or patently absurd determination. [Citation.]" (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1335; *In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

The legal principles applicable when a section 388 petition is denied without an evidentiary hearing were recently set out in *In re G.B.* (2014) 227 Cal.App.4th 1147. "Under section 388, a parent may petition to change or set aside a prior order 'upon grounds of change of circumstance or new evidence.' (§ 388, subd. (a)(1); see also Cal. Rules of Court, rule 5.570(a).) The juvenile court shall order a hearing where 'it appears that the best interests of the child . . . may be promoted' . . . by the new order. (§ 388, subd. (d).) Thus, the parent must sufficiently allege *both* a change in circumstances or new evidence *and* the promotion of the child's best interests. [Citation.]" (*Id.* at p. 1157, original italics, fn. omitted.)

"A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. [Citations.] It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing.

[Citations.] While the petition must be liberally construed in favor of its sufficiency [citations], the allegations must nonetheless describe specifically how the petition will advance the child’s best interests. [Citations.]” (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1157.) The summary denial of a petition under section 388 is only appropriate if the petition “fails to state a change of circumstance or new evidence that even *might* require a change of order” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

Father’s section 388 petition alleged his circumstances had changed because he was maintaining consistent visitation with E.B., and was participating in a parenting class. The petition also included the fact that Father was participating in a support group through Fatherhood Collaborative and he had obtained steady employment and stable housing. However, while the petition showed Father was making efforts at improving his parenting skills, the petition did not include any information about whether Father had completed the parenting class, nor did it contain any information about Father’s progress in the class, or if the class met his case plan requirements. In addition, the petition did not contain any information about Father’s substance abuse problem, or whether Father was doing anything to become or remain sober. A *prima facie* showing of *changing*, as opposed to *changed*, circumstances is not enough. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days of sobriety insufficient given long history of drug abuse]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [120 days of sobriety insufficient to show “real reform”].)

Father’s section 388 petition also failed to show that a change in the case plan to provide him reunification services would be in E.B.’s best interest. A section 388 petition may be summarily denied where it fails to make a *prima facie* showing that the best interests of the child will be promoted by the proposed change of order. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) It is more difficult to show that granting a section 388 petition is in

the child's best interests when the changing circumstances come after reunification services have been terminated or have been denied, at which time the child's need for a permanent, stable home is paramount. (See *In re Jasmon O.* (1994) 8 Cal.4th 398, 420; *In re Casey D.* (1999) 70 Cal.App.4th 38, 48.) "At this point in the proceedings, on the eve of the selection and implementation hearing, the [child's] interest in stability was the court's foremost concern, outweighing any interest [father] may have in reunification. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.)

Here, Father's section 388 petition was filed on the eve of the permanency hearing. At the time of the hearing, E.B. was thriving in her grandmother's home. There was no prima facie showing that it was in E.B.'s best interests to prolong uncertainty and postpone permanency with the hope that offering Father further services would allow him to eventually provide E.B. with a safe and stable home. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of § 388 petition was proper where there was no showing of how the childrens' best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].)

Accordingly, the juvenile court acted well within its discretion in denying Father's section 388 petition without holding an evidentiary hearing. The juvenile court properly found that Father did not make a prima facie showing as to either changed circumstances, or that modification of the court's prior orders would promote E.B.'s best interests.

DISPOSITION

The order is affirmed.

RUSHING, P.J.

WE CONCUR:

ELIA, J.

WALSH, J.*

* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.